

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DAVID WAYNE DEPAPE,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

Application for Extension of Time Within
Which to File a Petition for a Writ of Certiorari
to the U.S. Court of Appeals for the Ninth Circuit

APPLICATION TO THE HONORABLE
ELENA KAGAN AS CIRCUIT JUSTICE

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APPLICATION FOR EXTENSION OF TIME

Under this Court's Rule 13.5, Applicant David Wayne DePape respectfully requests a 30-day extension of time within which to file a petition for a writ of certiorari, to and including October 29, 2026.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The judgment for which review is sought is *United States v. DePape*, 170 F.4th 1239 (9th Cir. 2026), attached as Exhibit 1. The Ninth Circuit's order denying panel and en banc rehearing is attached as Exhibit 2.

JURISDICTION

This Court will have jurisdiction over any timely petition under 28 U.S.C. § 1254(1). The Ninth Circuit issued its judgment on March 25, 2026, *see* Ex. 1, and it denied a timely petition for rehearing on July 1, 2026, *see* Ex. 2. Thus, under Rule 13.1, a petition to this Court is currently due by September 29, 2026. In accordance with Rule 13.5, this application is being filed at least 10 days before that date. No prior extension of time has been requested.

REASONS JUSTIFYING AN EXTENSION OF TIME

1. This case presents an important and recurring question concerning the finality of federal criminal sentences: whether Federal Rule of Criminal Procedure 35(a), which permits a district court to "correct a sentence that resulted from arithmetical, technical, or other clear error" within fourteen days, authorizes a

district court to vacate a sentence and conduct a new plenary sentencing proceeding in order to cure a denial of the defendant’s right of allocution. In a published opinion resolving what it described as a question it had “not yet addressed,” the Ninth Circuit held that it does, concluding that a district court’s failure to afford the right of allocution is “unquestionably erroneous” and therefore “other clear error,” reasoning that, by its terms, extends to any procedural violation of Federal Rule of Criminal Procedure 32. Ex. 1 at 4–9.

That holding conflicts with the Third Circuit’s decision in *United States v. M.M.*, 23 F.4th 216, 220–21 (3d Cir. 2021), which held Rule 35(a) “exceedingly narrow” and, applying ejusdem generis, limited “other clear error” to errors “akin to an arithmetical or a technical error,” i.e., errors readily ascertainable from the judgment itself, of the kind that render a sentence illegal rather than merely reopen the court’s discretionary judgment. It is also difficult to square with the Rule’s text, which reaches only a sentence that “resulted from” error and authorizes the court to “correct” that sentence rather than to conduct sentencing anew, and with the Advisory Committee’s admonition that the authority “is intended to be very narrow” and is not to be “used to reopen issues previously resolved at the sentencing hearing through the exercise of the court’s discretion.” Fed. R. Crim. P. 35 advisory committee’s note to 1991 amendment. Those limits take on added force against the backdrop of 18 U.S.C. § 3582(c), which bars modification of an imposed term of imprisonment save in narrowly defined circumstances. Because the panel’s reasoning extends to any procedural violation of Rule 32, and because the scope of Rule 35(a) determines when a criminal judgment becomes final and whether a

reversible sentencing error may be cured over the defendant's objection before any appeal can be taken, the question warrants this Court's review. It was preserved at every stage, reviewed de novo, and was the sole basis for the judgment below.

2. An extension is warranted to allow counsel time to adequately prepare a petition that will aid the Court's review of this important issue. Undersigned counsel is a busy public defender, and the press of other business has occupied his time during much of the initial 90-day period in which to file a petition. Specifically, undersigned counsel prepared the reply in support of the petition for a writ of certiorari in *Keller v. United States*, No. 25-7141, which was filed on August 13, 2026; the reply brief in *United States v. Rollins*, Nos. 25-3701 & 25-3702 (9th Cir.), which was filed on August 19, 2026; and is preparing the opening brief in *United States v. Jones*, No. 26-1426 (9th Cir.), which is currently due on October 14, 2026. Undersigned counsel is also preparing for an oral argument before the Ninth Circuit in *United States v. Rollins*, Nos. 25-3701 & 25-3702, which is scheduled for October 21, 2026. Undersigned counsel also has substantial responsibilities in the district court, including litigating many 28 U.S.C. § 2241 habeas petitions brought by detained immigrants challenging their detention by Immigration and Customs Enforcement, which frequently require litigating motions for temporary restraining orders on tight deadlines. Undersigned counsel was also on leave for approximately three weeks over the summer months.

Undersigned counsel also has substantial administrative responsibilities, including overseeing hiring and supervision of law student interns, and coordinating appointment of counsel for all incoming motions for sentence

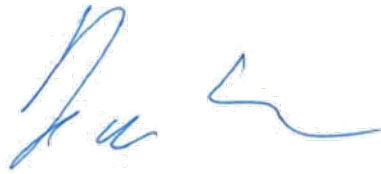
reductions under 18 U.S.C. § 3582(c)(1)(A) in the district court. Undersigned counsel also frequently assists trial attorneys in the district court with briefing dispositive motions and complex sentencing matters. Finally, this petition will undergo review by multiple supervisors in counsel's office, a lengthy process, and Applicant therefore requires additional time to comply with these procedures.

CONCLUSION

For these reasons, Applicant respectfully requests a 30-day extension of time within which to file a petition for a writ of certiorari, to and including October 29, 2026.

September 18, 2026

Respectfully submitted,
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